

Joseph R. Manning, Jr. (SBN: 223381)
Babak Hashemi (SBN: 263494)
LAW OFFICES OF JOSEPH R. MANNING, JR.
A PROFESSIONAL CORPORATION
4667 MacArthur Blvd., Suite 150
Newport Beach, California 92660
Tel: 949.200.8755; Fax: 866.843.8308
ecf@manninglawoffic.com

Attorneys for PLAINTIFFS LEE J. WARE and IRMA WARE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LEE J. WARE, an individual and
IRMA WARE, an individual;

Plaintiffs,

v.

BAYVIEW LOAN SERVICING,
LLC, a business entity form
unknown, AZTEC
FORECLOSURE
CORPORATION, a business
entity form unknown, and DOES
1-100, inclusive,

Defendants.

CASE No: 3:13-cv-01310-JLS-NLS

**NOTICE OF *EX PARTE* AND *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER OR STAY AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES; SUPPORTING
DECLARATIONS OF BABAK HASHEMI,
LEE AND IRMA WARE.**

DATE: JUNE 13, 2013

TIME: TBD

COURT: 4A

PLEASE TAKE NOTICE THAT Plaintiffs, LEE J. WARE and IRMA WARE,
hereby apply *Ex Parte* to this Court, for a Temporary Restraining Order and Order to
Show Cause Re Preliminary Injunction or in the alternative a stay order.

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ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

1 *Ex Parte* relief is appropriate and necessary in this instance because the Trustee's
2 Sale is scheduled for June 14, 2013 at 10:00 a.m. and Plaintiffs will suffer irreparable
3 harm if Defendants were not enjoined from advertising, holding, conducting or
4 participating in any foreclosure sale and trustee's sale of Plaintiffs' property. Plaintiffs
5 filed suit against Defendants on May 9, 2013 in the Superior Court of California County
6 of San Diego for causes of actions based on California law; however, Defendant's
7 removed the action to this Federal District Court based on Diversity Jurisdiction.
8 Plaintiffs, through their counsel requested that the foreclosure sale of the Subject
9 Property be postponed or canceled, pending a full resolution of Plaintiffs' claims;
10 however, the sale date remains active.
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16 Plaintiffs' *Ex Parte* application is based on the following:

- 17 1. Plaintiffs are likely to succeed on the merits;
 - 18 2. Plaintiffs will suffer irreparable harm in the absence of a TRO and a
19 Preliminary Injunction;
 - 20 3. The balance of equities tips in the Plaintiffs' favor;
 - 21 4. It is in the public's interest.
- 22
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26 ///

1 This *ex parte* application is supported by the accompanying Memorandum of
2 Points and Authorities, Supporting Declarations of Babak Hashemi LEE J. WARE and
3 IRMA WARE, Ex Parte Notice, exhibits, all pleadings and papers on file, and any oral
4 arguments that may be presented at the time of the hearing.
5
6

7 Dated: June 12, 2013

LAW OFFICES OF JOSEPH R. MANNING, JR.

9 By: /s/ Joseph R. Manning, Jr.
10 Joseph R. Manning, Jr., Esq.
11 Babak Hashemi, Esq.
12 Attorneys for Plaintiffs
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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED

Plaintiffs hereby seek an order of this court to stop the sale of their home as set forth below. The primary purpose of this hearing is to maintain the *status quo* pending a full hearing on the merits. Plaintiffs are likely to succeed on the merits and will suffer immediate, irreparable harm if Defendants are not enjoined from proceeding with pending the foreclosure sale of the Subject Property which is set for **June 14, 2013**.

Plaintiffs request relief in either a Temporary Restraining Order or a Stay Order as an alternative to preserve the status quo and prevent the irreparable loss of the Subject Property before judgment. Plaintiffs are likely to succeed on the merits, will suffer irreparable harm in the absence of the relief and the balance of equities tips in Plaintiffs' favor. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). With regards to foreclosure related cases, the Ninth Circuit stated that "[c]omplaints need only allege facts with sufficient specificity to notify defendants of Plaintiffs' claims." *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787, 790 (9th Cir. 2011). "[S]o long as the plaintiff alleges facts to support a theory that is not factually implausible, the court's skepticism is best reserved for later stages of the proceedings when the Plaintiff's case can be rejected on evidentiary grounds." *Id.* at 791 Quoting *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008).

Moreover, the Ninth Circuit holds that a plaintiff is entitled to injunctive relief if he satisfies either of two tests: (1) the *Winter* factor test; or (2) the "sliding scale" test, also

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1 referred to as the “serious questions” test. *See Alliance for the Wild Rockies v. Cottrell*, 632
2 F.3d 1127, 1135 (9th Cir. 2011). The sliding scale test requires a slightly weaker showing
3 of success on the merits to be outweighed by strong equitable considerations. *Se id.* 632
4 F.3d at 1134-35. Here, the potential for harm to the Plaintiffs is great and Plaintiffs have
5 made a sufficient showing of a likelihood of success of the merits.
6

7 **II. STATEMENT OF THE CASE**

8
9 Plaintiffs filed a complaint against BAYVIEW LOAN SERVICING, LLC.
10 (“BAYVIEW”) and AZTEC FORECLOSURE CORPORATION (“Defendants”) for
11 violations of *California Civil Code* §2923.6, *California Civil Code* §2924, Violations of
12 *California Business & Professions Code* §17200, Negligence and a demand for
13 Accounting. The case was filed on May 9, 2013. Plaintiffs move *ex parte* for a
14 Temporary Restraining Order to restrain and enjoin Defendants from proceeding with
15 any foreclosure activity relating to the real property commonly known **8248 Rockview**
16 **Drive, El Cajon, CA 92021** (Hereinafter, “Subject Property”)
17
18
19

20 In 2007, Plaintiffs entered into a written loan agreement for a sum of \$330,000
21 (the “Loan”), secured by the Subject Property through a Deed of Trust recorded
22 November 15, 2007, then and now Plaintiffs’ principal residence.
23

24 Plaintiffs performed dutifully under the Loan, as required, until 2011 when, due
25 to the downturn in the economy, Plaintiff suffered a temporary financial setback.
26 Thereafter, she made some of the monthly mortgage payments under the terms of the
27 Loan, but was unable to make all the required payments.
28

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1 Unbeknownst to Plaintiffs, in the process of refinancing their home, Plaintiffs
2 were put into a negative amortization loan that Plaintiffs could not afford. Plaintiffs'
3 loan broker misrepresented and misinformed Plaintiffs of the terms of the monthly
4 payments, and as the payments continued to increase over time and deferred interest
5 piled on to the Loan balance, Plaintiffs knew they would not be able to keep up with
6 monthly payments for very long.
7

8
9 Soon thereafter, Plaintiff Lee Ware's business suffered a significant financial
10 setback, due to the poor economy, and as a result, Plaintiffs' income had significantly
11 decreased. At that point, Plaintiffs had no choice but to use the money in their savings
12 and investments accounts to remain current on the Loan.
13

14
15 Over the next year or so, Plaintiffs continued to make mortgage payments
16 under the Loan, sometimes falling behind on one (1) or two (2) months, until late
17 2010, when Plaintiffs exhausted through their savings and were forced to stop making
18 the monthly payments.
19

20 In an effort to prevent foreclosure proceedings, Plaintiffs contacted their lender
21 at the time, Virtual Bank, a Division of Lydian Private Bank, to inquire about a loan
22 modification option.
23

24 Virtual Bank, through its representative, informed Plaintiffs that they
25 "qualified" for a loan modification, and promised Plaintiffs that if they submitted a
26 loan modification application, then no foreclosure activity would take place while
27 their application was in review. This representation led Plaintiffs to believe that they
28

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1 would qualify for a loan modification, that they would secure a new affordable
2 monthly mortgage payment, and that they would retain the Subject Property.

3
4 Immediately thereafter, Plaintiffs applied for a loan modification and submitted
5 a complete application, along with all necessary paperwork, directly to Virtual Bank,
6 via facsimile.

7
8 Over the next few months, Plaintiffs consistently received letters from Virtual
9 Bank requesting financial documents, and as requested, Plaintiffs continued to submit
10 and resubmit updated financial documents and followed-up weekly with Virtual
11 Bank.
12

13 However, on or around April 4, 2011, while Plaintiffs were “in review” and
14 submitting financial documents as requested by Virtual Bank, Defendants executed a
15 Notice of Default and Election to Sell Under Deed of Trust (the “NOD” or “Notice of
16 Default”) on the Subject Property. Attached as **Exhibit A** is a true and correct copy of
17 the NOD, recorded on April 5, 2011.
18
19

20 Plaintiffs contacted Virtual Bank, and its representative advised Plaintiffs that
21 the NOD would be held in “suspense,” and for Plaintiffs to continue submitting their
22 updated financial documents and to continue working with Virtual Bank during the
23 loan modification process because a loan modification was imminent. Plaintiffs
24 justifiably relied on Virtual Bank’s representations and continued the loan
25 modification process.
26
27

28 However, as Plaintiffs’ financial situation continued to worsen and Plaintiffs

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1 were desperate to avoid foreclosure, Plaintiffs had no choice but to file for Chapter 13
2 Bankruptcy in or around July 2011, and a Chapter 13 Plan was confirmed in or
3 around February 2012.
4

5 In or around October 2012, Sabadell United Bank, N.A., as Receiver for
6 Virtual Bank, a Division of Lydian Private Bank, filed a Motion for Relief from Stay.
7

8 At that point, Plaintiffs reasonably believed that foreclosure proceedings would
9 commence, and in an effort to avoid foreclosure, Plaintiffs decided to pursue a short
10 sale. In or around November 2012, Plaintiffs' realtor drafted a full Residential Listing
11 Agreement ("Agreement"), in which Plaintiffs were to short sell the Subject Property
12 to Pacific Sotheby's International Realty. All of the parties to the transaction signed
13 the Agreement on or around November 13, 2012. Attached as **Exhibit B** is a true and
14 correct copy of the Agreement.
15
16

17 On or about February 12, 2013, the Motion for Relief from Stay was granted
18 and the Court Order was filed and mailed to Plaintiffs.
19

20 On or about March 11, 2013, Defendants executed and recorded a Notice of
21 Trustee's Sale (the "NTS" or "Notice of Sale"), against the Subject Property.
22 Attached as **Exhibit C** is a true and correct copy of the NTS.
23

24 Immediately thereafter, Plaintiffs contacted Virtual Bank to inquire as to
25 Plaintiffs' loss mitigation options and specifically, a loan modification; however,
26 Virtual Bank was not willing to help Plaintiffs modify their loan, but its
27 representative advised Plaintiffs that with their Residential Listing Agreement already
28

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1 done and signed by all parties, Plaintiffs' qualified for a short sale and that a short
2 sale was Plaintiffs' best option.

3
4 Plaintiffs justifiably relied on Virtual Bank's representations and submitted an
5 application for a short sale to Virtual Bank, via facsimile, on or around March 18,
6 2013.

7
8 On or about April 3, 2013, Plaintiffs received a letter, informing them that
9 Defendant Bayview Loan Servicing, LLC, acting as agent on behalf of Virtual Bank,
10 had received Plaintiffs' request to be offered a foreclosure alternative. The letter
11 further stated that within five (5) days, Bayview would review the documentation
12 Plaintiffs provided and it would contact Plaintiffs, and it would take approximately
13 thirty (30) days to make a decision regarding Plaintiffs' request.

14
15
16 However, on or about April 9, 2013, Plaintiffs received a letter from Defendant
17 Bayview, informing Plaintiffs that the review was complete and that Plaintiffs were
18 ineligible for Bayview's programs because it serviced Plaintiffs' loan on behalf of an
19 investor or group of investors that had not approved a short sale of the Loan.
20 However, no further explanation was given. Attached as **Exhibit D** is a true and
21 correct copy of the denial letter.

22
23
24 The letter **did not include** the specific reasons for the investor disallowance or
25 a description of other foreclosure prevention alternatives for which Plaintiffs may
26 have been eligible AND a list of steps Plaintiffs needed to take in order to be
27 considered for those options. These are clear violations of the Homeowner's Bill of
28

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1 Rights, specifically Civil Code §2923.6(f).

2 Thereafter, on or about April 15, 2013, Plaintiffs received a Notice of
3
4 Postponement of Foreclosure Sale from Defendant Aztec Foreclosure Corporation,
5 advising Plaintiffs that the foreclosure sale had been postponed to May 14, 2013.
6 Attached as **Exhibit E** is a true and correct copy of the Notice.
7

8 Plaintiffs attempted to contact Defendants Bayview and Aztec Foreclosure
9 several times to get an explanation regarding their short sale denial and what other
10 options Plaintiffs had to prevent foreclosure, as their financial circumstances had
11 changed. However, they were unable to speak to the same representative on the
12 telephone more than once, and ultimately they were unable to speak to anyone who
13 knew anything about Plaintiffs' file and who was willing to help them or provide
14 them with insightful information.
15
16

17 At this time, Plaintiffs have been unable to negotiate a mortgage payment that
18 they can afford and have been prevented from curing the default because of the
19 substantial arrearages, which include unnecessary marked up fees added to the loan
20 balance.
21
22

23 Plaintiffs are in possession of the Subject Property and no Trustee's sale has
24 occurred; however, a Trustee's sale is currently scheduled for **June 14, 2013. As a**
25 **result, the instant action became necessary.**
26

27 Defendants, acting as lenders, mortgage servicers, trustees, and/or beneficiaries,
28 received, and continue to receive, a financial incentive on each loan modification or

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1 short-sale application a borrower submits. Because of this type of incentive, Defendants
2 benefit from allowing Plaintiffs' request to drag on, rendering the financial documents
3 submitted in support thereto to become stale; thus, requiring Plaintiffs, and other
4 similarly situated borrowers to restart the application process, rather than actually
5 reviewing Plaintiffs' application.
6

7
8 The Defendants' acts and material omissions herein alleged were undertaken
9 willfully, persistently, intentionally, knowingly, and/or in gross or reckless disregard of
10 Plaintiffs' notice and disclosure rights.
11

12 Defendants, as employers of the authorized representatives who had contact with
13 Plaintiffs, had advanced knowledge of the unfitness of the employee representatives and
14 employed such representatives with a conscious disregard of the rights or safety of
15 others, or authorized/ratified the wrongful conduct for which the damages are awarded
16 or was personally guilty of oppression, fraud, or malice.
17

18
19 Defendants are corporate employers. As such, their officers, directors, and/or
20 managing agents had advanced knowledge of the willful and despicable conduct herein
21 alleged and ratified the aforementioned acts of their authorized representatives and
22 employees.
23

24 Plaintiffs are ready, willing, and able to enter into a loss mitigation program that
25 is affordable for Plaintiffs and more profitable to Defendants than a foreclosure of the
26 Subject Property, and Plaintiffs are ready, willing, and able to make such payments at
27 the times required.
28

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III. ARGUMENT

A. Just Cause Exists to Stop Enjoin the Sale Because of Defendants' Violations of the Homeowner's Bill of Rights

Plaintiffs have standing to bring this suit because they are “borrowers” under the deed of trust secured by the Subject Property. Pursuant to *Civil Code* §2920.5, “borrower” means any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through his or her mortgage servicer”. (*Civil Code* §2920.5 (c)).

As alleged in the complaint, **Plaintiffs have experienced a material change in their financial circumstances** since the last time Plaintiffs submitted a complete application for a foreclosure prevention alternative. Plaintiffs, through their attorney have documented and submitted these changes to Defendants, via facsimile, in a letter dated May 8, 2013. A true and correct copy of this letter to Defendants informing them of Plaintiffs’ financial changes, along with the fax confirmation sheets, are attached and incorporated hereto as **Exhibit “F”**.

Plaintiffs’ change in financial circumstances are a result of increase in expenses. Defendant Bayview is in possession of all material documents supporting such change. Pursuant to *Civil Code* §2923.6 Defendant is mandated to review Plaintiffs’ modification request for two (2) reasons: Plaintiffs were never fairly considered, and Plaintiffs’ income has changed and such information regarding the change has been

1 submitted to Bayview.

2 As set forth herein, pursuant to the provisions of Civil Code §2923.6, under the
3 California Homeowner's Bill of Rights, if there has been a material change in the
4 borrower's financial circumstances, and that change has been documented and
5 submitted to the mortgage servicer, the mortgage servicer must evaluate the borrower's
6 complete application. In addition, §2923.6 requires that *all foreclosure activity must*
7 *cease while a review of the application is pending.*

8 Pursuant to the provisions of *Civil Code* §2923.6 and the Homeowner's Bill of
9 Rights, if there has been a material change in the borrower's financial circumstances,
10 and that change has been documented and submitted to the mortgage servicer, the
11 mortgage servicer or lender is obligated to evaluate the borrower for a foreclosure
12 alternative, including but not limited to a loan modification. In addition, §2923.6
13 requires that all foreclosure activity must cease once notice of this change has been
14 given and a review of the new financial circumstances is evaluated. A true and correct
15 copy of all relevant *Civil Code* sections under the Homeowner's Bill of Rights is
16 attached and incorporated hereto as **Exhibit "G"**.

17 According to this code section, Bayview must not only review Plaintiffs for a
18 foreclosure alternative, but it may not continue foreclosure activity on the subject
19 property until after the optional appeal of the written denial, as set forth in *Civil Code*
20 §2923.6(c) (**Exhibit "G"**, pp. 12-13).

21 Continuing with foreclosure proceedings of the Subject Property while Plaintiffs

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1 are under mandatory review is also a violation of *Bus. And Prof. Code* §17200, as an
2 unlawful and unfair business practice. Pursuant to the provisions of *Civil Code*
3 §2924g(c)(1)(A), a foreclosure sale may be properly postponed by order of a Court of
4 competent jurisdiction, including this Court.
5

6
7 **B. The Complaint and the Basis for Injunctive Relief**

8 Plaintiffs seeks a Temporary Restraining Order or in the alternative a stay order
9 on the grounds that Defendants' foreclosure on the Subject Property violates California
10 *Civil Code* §§2923.6, 2924, California *Business and Professions Code* §17200, and
11 other statutory and common law in effect.
12

13 As permitted by *Federal Rules of Civil Procedure* 65, Plaintiffs have alleged
14 several clear and convincing causes of action in which Plaintiffs are likely to succeed
15 on. Defendants' violations of *Civil Code* §2923.6 and fraudulent, unfair and unlawful
16 business practices under *Business and Professions Code* §17200 are factually supported
17 through evidence and testimony and will lead to a final ruling for Plaintiffs.
18

19
20 Defendants are unlawfully proceeding with a foreclosure sale of the Subject
21 Property and unless and until Defendants are enjoined and restrained by order of this
22 Court, Plaintiffs will suffer irreparable harm. The sale of Plaintiffs' home will cause
23 immediate, great and irreparable injury to Plaintiffs and their family. The foreclosure
24 sale of the Subject Property will reduce the value of the property and will eliminate
25 Plaintiffs' interest in the Subject Property. On these grounds alone, this Court may grant
26 the TRO pursuant to *FRCP* 65.
27
28

Pursuant to *FRCP* 65, the court may grant injunctive relief in order to prevent “immediate and irreparable injury.” *Fed. R. Civ. P.* 65(b)(1)(A). Temporary Restraining Order is vital to postpone and stop the imminent sale of the Subject Property. Pursuant to *Civil Code* §2924.15, *Civil Code* §2923.6 applies only to mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four (4) dwelling units. For these purposes, “owner-occupied” means that the property is the principal residence of the borrower as indicated in loan documents. Here, the Subject Property contains no more than four (4) dwelling units (a single family residence) and is Plaintiffs’ principal residence. Plaintiffs squarely satisfy these requirements; therefore, pursuant to *Civil Code* §2923.6, Plaintiffs are entitled to an order halting the scheduled foreclosure sale.

Plaintiffs do not have an adequate remedy at law for the harm threatened by Defendants’ wrongful conduct. A foreclosure sale of the Subject Property will unjustly deprive Plaintiffs of property rights and would reduce/eliminate any equity interest in the home.

1. Violation(s) of California Civil Code §2923.6

Plaintiffs desperately request this Court to issue a TRO because Plaintiffs demonstrate that Defendant Bayview failed to comply with the mandatory provisions of *Civil Code* §2923.6, and the postponement of the foreclosure sale is the proper remedy.

The intent of the California legislators in enacting *Civil Code* §2923.6 was to address the consequences of the subprime mortgage crisis leading to declining real

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1 property values and historic levels of foreclosure. Given the vast and devastating impact
2 of the crisis, the objective of the *Code* was to make sure lenders, loan servicers, and
3 their agents were communicating and working with borrowers in default to assess the
4 borrowers' financial situation and discuss foreclosure alternatives **before** a foreclosure
5 is started by recording a notice of default. The intent of the legislature is clear and the
6 requirements that it has imposed are by no means arbitrary.

7
8
9 Defendants' failure to comply with *Civil Code* §2923.6 directly undermines the
10 intent behind the statute. This failure to adhere to the statute renders it meaningless and,
11 if not enforced, it will serve to perpetuate a cycle that results in far too many
12 homeowners being rendered helpless. As a result, Defendants are liable to Plaintiffs for
13 any and all statutory and/or actual damages which have resulted from their conduct

14
15
16 *Civil Code* §2923.6(g) mandates the mortgage servicer shall not be obligated to
17 evaluate applications from borrowers who have already been evaluated or afforded a
18 fair opportunity to be evaluated for a foreclosure prevention alternative prior to January
19 1, 2013, **unless there has been a material change in the borrower's financial**
20 **circumstances** since the date of the borrower's previous application and that change is
21 documented by the borrower and submitted to the mortgage servicer. (Exhibit "G", pg
22 12). Plaintiffs have not been fairly evaluated for a foreclosure alternative and have
23 experienced a "material change in their financial circumstances".

24
25
26
27 As alleged, Plaintiffs' income and expenses have materially changed since the
28 last time Plaintiffs submitted a complete application for a foreclosure prevention

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1 alternative. Specifically, Bayview never fairly evaluated or afforded Plaintiffs a fair
2 opportunity to be evaluated for a foreclosure prevention alternative, as alleged in the
3 Complaint and set forth herein, and there has been a material change in Plaintiffs'
4 disposable income, and that change has been documented and submitted to Defendants
5 via facsimile. A true and correct copy of the May 8, 2013 letter to Defendants
6 informing them of Plaintiffs' material financial changes, along with the fax
7 confirmation sheets, are attached and incorporated hereto as Exhibit "F".
8

9
10 Accordingly, under *Civil Code* §2923.6, Bayview must evaluate Plaintiffs for a
11 foreclosure alternative, including a loan modification. Defendants may NOT continue
12 with or conduct any foreclosure activity, while a review of the loan modification
13 application is pending.
14
15

16 Plaintiffs request that this Court grant this application for a TRO because
17 Plaintiffs can show that Defendant, Bayview failed to satisfy the mandatory provisions
18 of *Civil Code* §2923.6, and the postponement of the foreclosure sale is the only proper
19 remedy.
20

21 a. Improper Denial
22

23 *Civil Code* §2923.6(f) states that following the denial of a first lien loan
24 modification application, the mortgage servicer is obligated to send a written notice to
25 the borrower identifying the **reasons for denial**, including the following:
26

- 27 a. The amount of time from the date of the denial letter in which the borrower
28 may request an appeal and instructions regarding how to appeal the denial;

- b. If the denial was based on investor disallowance, the specific reasons for the investor disallowance;
- c. If the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the NPV and a statement that the borrower may, upon written request to the servicer, obtain ALL of the inputs used in the NPV calculation;
- d. If applicable, a finding that the borrower was previously offered a loan modification and failed to successfully make payments under the terms of the modified loan; and
- e. If applicable, a description of other foreclosure alternatives for which the borrower may be eligible AND a list of the steps the borrower must take in order to be considered for those options. If the mortgage servicer has already approved the borrower for another foreclosure alternative, information necessary for the borrower to complete that foreclosure alternative.

In this case, April 9, 2013, Bayview's letter stated that the review was complete and that Plaintiffs were ineligible for any programs because it serviced our loan on behalf of an investor or group of investors that had not approved a short sale of the Loan. No further explanation was given Defendants' denial letters sent to Plaintiffs failed to meet the above requirements. The letter does not state specific reasons for the denial of Plaintiffs' request for loan modification and does not include the inputs used to calculate NPV or variables used to make a determination denying the short-sale.

Plaintiffs allege that if this denial was based on the investor's disallowance to provide Plaintiffs with a foreclosure alternative, the denial letter should, but does not

1 include the criteria for the investor guidelines in order to obtain a loan modification or
2 complete a short-sale. Pursuant to *California Civil Code* §2923.6(f) (2), if a denial is
3 based on the investor's disallowance, such denial letters must state the specific reasons
4 for the investor disallowance.
5

6
7 Despite being put on notice of these facts, Defendants intend to continue with the
8 scheduled foreclosure activity on the Subject Property and will hold a Trustee sale of
9 the Subject Property that is currently scheduled for **June 14, 2013. This is a blatant**
10 **violation of *Civil Code* §2923.6.**
11

12 Therefore, pursuant to the Homeowner's Bill of Rights, and specifically *Civil*
13 *Code* §2923.6, the foreclosure sale date of the Subject Property must be enjoined, and
14 Plaintiffs must be evaluated for a foreclosure prevention alternative or a loan
15 modification.
16

17 As a result of Defendants' wrongful acts and omissions, Plaintiffs have been
18 prejudiced by Defendants' acts and omissions. The foreclosure process instituted by
19 Defendants must cease and Defendants must comply with the mandatory provisions
20 under *Civil Code* §2923.6.
21

22
23 Plaintiffs were forced to file a Complaint, and seek a court order enjoining
24 Defendants' conduct and stop the imminent sale of a family home. As such, Plaintiffs
25 submit that they have good cause to stop the foreclosure sale
26

27 **2. Violation of California Business and Professions Code §17200 et seq.**
28

Plaintiffs plea to this Court to issue a TRO based on conduct which clearly

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1 violates California *Business and Professions Code* §17200, as “unlawful, unfair and/or
2 fraudulent business act or practices”. Plaintiffs’ §17200 claim is grounded on
3 Defendants’ violations of *Civil Code* §2923.6 and §2924, *et seq* and unfair business
4 practices.
5

6 This Court has jurisdiction over this action pursuant to *Bus. and Prof. Code*
7 §17200, *et seq.*, specifically *Bus. and Prof. Code* §17203, which provides that any
8 person or entity who engages, has engaged, or proposes to engage in unfair competition
9 may be enjoined in any court of competent jurisdiction; and the Court may make such
10 orders or judgments, including the appointment of a receiver, as may be necessary, to
11 prevent the use or employment by any person of any practice which constitutes unfair
12 competition, or as may be necessary to restore to any person in interest any money or
13 property, real or personal, which may have been acquired by means of such unfair
14 competition; and *Bus. and Prof. Code* §17204, which provides that actions for any relief
15 pursuant to Unfair Competition Law (“UCL”) to be prosecuted exclusively in a court of
16 competent jurisdiction by any board, officer, person, corporation or association or by
17 any person acting for the interests of itself, their members, or the general public.
18
19

20 *Bus. and Prof. Code* §17200 also prohibits any “fraudulent business act or
21 practice.” Defendants’ concealment of material facts, as set forth herein, was misleading
22 and likely to deceive the public within the meaning of this section. This concealment
23 was made with awareness of its effect, and was done to induce Plaintiffs to pay the
24 marked-up and/or unnecessary fees for default-related services. Moreover, Defendants
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1 recorded foreclosure related documents into public records without the power or
2 authority to do so.

3
4 Specifically, as fully set forth herein and in the Complaint, Defendants engaged
5 in deceptive business practices with respect to mortgage loan servicing, foreclosure of
6 residential properties, and related matters, by, among other things:

- 7
8 a. Recording the Notice of Default, the Notice of Sale, and conducting a
9 Trustee's sale without complying with *Civil Code* §2923.6, by failing to
10 evaluate Plaintiffs' application, or affording Plaintiffs a fair opportunity to
11 be evaluated for a loan modification, after a documented **material change**
12 **of financial circumstances**;
- 13 b. Instituting improper or premature foreclosure proceedings to generate
14 unwarranted fees;
- 15 c. Misrepresenting the foreclosure status to Plaintiffs regarding the property;
16 and
- 17 d. Concealing the true character, quality, and nature of their assessment of
18 marked-up fees against Plaintiffs; account.

19 In addition, in the course and conduct of its loan servicing and collection,
20 Defendants omitted a true itemization that identifies the nature of each fee, and they
21 failed to disclose the nature of the charges and fees assessed. Defendants concealed the
22 fact that the category identified as "Miscellaneous Fees" or "Other Charges" reflects
23 marked-up and/or unnecessary fees that were never incurred by Defendants. Relying on
24 Defendants, Plaintiffs believed they were obligated to pay the amounts specified in
25 Defendants' correspondences relating to default-related services.
26
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28

1 Plaintiffs relied on a reasonable expectation that Defendants complied with the
2 plain meaning of the mortgage agreement, Notes, Security Instruments, court orders,
3 and confirmed plans; as a result, Plaintiffs relied on Defendants' disclosures about the
4 fees appearing on statements, reasonably believing the "Other Charges," "Other Fees,"
5 or "Miscellaneous Fees" to be valid charges that were not unlawfully marked-up and/or
6 unnecessary. Indeed, to trick borrowers into a sense of trust and to dissuade them from
7 challenging Defendants' unlawful fee assessments. Defendants further conceal their
8 scheme by telling borrowers, in statements and other documents, that such fees are
9 "allowed by [borrowers'] Note and Security Instrument," or that they are "[i]n
10 accordance with the terms of your mortgage." Had the true nature of the fees been
11 disclosed to Plaintiff, she would have been aware of the mark-ups and unnecessary
12 nature of the fees, and would have disputed these charges.

13 Furthermore, by offering loan modification assistance and leading borrowers to
14 believe such assistance is being considered while the foreclosure process is underway is
15 an irreparable injury to Plaintiffs after Plaintiffs have **relied on** Defendants' offers to
16 modify their loan. This has prevented Plaintiffs from pursuing other workout options,
17 such as deed in lieu of foreclosure, short sale, and the like. In fact, the false promises
18 and false statements of Defendants, and each of them, were designed to unfairly
19 prejudice Plaintiffs and profit from their loss.

20 These violations were and remain to be a matter of Defendants' standard
21 corporate policy, and constitute a consistent pattern and practice of unlawful corporate

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1 behavior. Defendants' actions are contrary to public policy; as such, the California
2 State legislature enacted the Homeowner's Bill of Rights, including *Civil Code*
3 §2923.6, as an emergency act, so unlawful foreclosures could be avoided.

4
5 Defendants' acts and practices constitute "unfair" and "unlawful" business acts
6 under *Bus. and Prof. Code* §17200, *et seq.*, in said acts and practices offend public
7 policy and are substantially injurious to Plaintiffs. These unfair and unlawful acts and
8 practices provide no utility, except hearty profits; clearly less utility to outweigh the
9 substantial harm to Plaintiffs.
10

11
12 Plaintiffs allege that these acts are a serious threat to Plaintiffs, because they
13 allowed, or will allow, Defendants to wrongfully foreclose on the Subject Property,
14 transfer title, and to cause the imminent eviction of Plaintiffs from the home. Because
15 of Defendants' illegal actions, Plaintiffs will be forced out of the Subject Property, and
16 such eviction will undoubtedly cause Plaintiffs immediate and irreparable injury.
17

18
19 As a direct and proximate result of Defendants' unlawful, unfair and fraudulent
20 business practices, Plaintiffs have suffered ascertainable losses; therefore, Defendants
21 must be enjoined from continuing such practices, pursuant to *Bus. and Prof. Code*
22 §17203 & §17204.
23

24 **a. Standing**

25 Standing to bring a UCL claim requires "a person who has suffered injury in fact
26 and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof.
27 Code § 17204. To have standing under the UCL, a plaintiff must sufficiently allege that
28

(1) she has lost “money or property” sufficient to constitute an “injury in fact” under Article III of the Constitution, and (2) there is a “causal connection” between the defendant’s alleged UCL violation and the plaintiff’s injury in fact. *Birdsong v. Apple, Inc.*, 590 F.3d 959-60 (9th Cir. 2009); *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855-56 (2008).

Under the UCL “[a]n injury to a tangible property interest, such as money, generally satisfies the ‘injury in fact’ element for standing.” ... “injury in fact” ... [means] ... “an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” ... “Injury-in-fact is not Mount Everest. “The contours of the injury-in-fact requirement, while not precisely defined, are very generous,” requiring only that claimant “allege some specific, ‘identifiable trifle’ of injury”.’ ” *Hale, supra*, 183 CA4th at 1381-84 (internal citations omitted.) The term “imminent” is defined as “ready to take place,” “hanging threateningly over one’s head,” and “menacingly near.” (Id. at 1384.)

Being at risk of foreclosure would constitute injury in fact. [See *Sullivan v. Wash. Mut. Bank, FA*, 2009 WL 3458300, at *4-5 (N. D. Cal. Oct.23, 2009) (concluding that the initiation of foreclosure proceedings put the plaintiff’s interest in her property sufficiently in jeopardy to allege an injury under § 17200); *Rabb v. BNC Mortgage, Inc.*, 2009 WL 3045812, at *2 (C.D.Cal. Sept. 21, 2009).

1 Plaintiffs allege that Defendants' actions have clouded their title, and by charging
2 unnecessary default related fees have caused them to lose equity interest in the subject
3 property. As discussed in the complaint, Plaintiffs' losses derive from Defendants'
4 collection of payments, adding improper charges to Plaintiffs' balance, and
5 unreasonably delaying Plaintiffs' loan modification and short-sale applications caused
6 Plaintiffs to lose equity interest in the Subject Property. These injuries are monetary and
7 may ultimately result in the loss of Plaintiffs' home. Being charged for marked-up and
8 unnecessary fees would constitute injury in fact. [See *Hale v. Sharp Healthcare* (2010)
9 183 CA4th 1373, 1383-84 (uninsured patient's UCL claim against hospital and its
10 owner adequately alleged standing where plaintiff alleged that she was promised
11 services at regular rates but was charged grossly excessive rates. Although plaintiff
12 paid only \$500 of her \$14,448 bill; patient faced at least an imminent invasion or injury
13 to a legally protected interest.)]

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19 **b. Unlawful, Unfair or Fraudulent Conduct**

20 Under the UCL, there are three varieties of unfair competition—business acts or
21 practices that are unlawful, unfair, or fraudulent. Cal. Bus. & Prof. Code § 17200.
22 “Each prong of the UCL is a separate and distinct theory of liability,” each offering “an
23 independent basis for relief.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir.
24 2009). Furthermore, a claim under § 17200 is “derivative of some other illegal conduct
25 or fraud committed by a defendant, and ‘[a] plaintiff must state with reasonable
26
27
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1 particularity the facts supporting the statutory elements of the violation.” *Id. Khoury*,
2 14 Cal. App. 4th at 619.

3
4 A business practice is “fraudulent” within the meaning of §17200 if “members”
5 of the public are likely to be deceived.” *Committee on Children’s Television v. General*
6 *Foods Corp.* (1983)35 C3d 197, 211, 197 CR 783, 791; accor, *Kasky v. Nike, Inc.*
7 (2002) 27 C4th 939, 119 CR2d 296; and *Prata v. Sup.Ct.* (2001) 91 CA4th 1128, 1144,
8 111 CR2d 293, 308. Common law fraud requires proof of five elements; by contrast,
9 under the *Children’s Television* test, a plaintiff can prove a prima facie case that a
10 business practice is “fraudulent” without having to prove intent, scienter, actual
11 reliance, or damage. All that is required is proof that “members of the public are likely
12 to be deceived.” *Schnall v. Hertz Corp.* (2000) 78 CA4th 1144, 1167, 93 CR2d 439,
13 456-457; *People v. Orange County Charitable Servs.* (1999) 73 CA4th 1054, 1076, 87
14 CR2d 253, 268. If anything, the prohibition against “fraudulent” business is broad and
15 it reaches practices that do not involve advertising. See *Allied Grape Growers v.*
16 *Bronco wine Co.* (1988) 203 CA3d 432, 249 CR 872. And that involve no untrue
17 statement. Here, Defendants publicly agreed to stop the practice of “dual tracking” and
18 specifically stated to Plaintiffs that no foreclosure activity would ensue while they’re
19 being considered for a foreclosure alternative.

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c. Defendants' Thoughtless March to Foreclosure on Plaintiff's Property is Sufficient to Establish Unfair and/or Unlawful Conduct.

"Unfair" conduct under Section 17200 has been commonly defined as conduct that "offends an established public policy or... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 939 (Cal. App. 2003). Here, Plaintiffs' claims support a finding that Defendants' activities were immoral, unethical, oppressive, unscrupulous and substantially injurious to Plaintiffs, not to mention against public policy. Here, Defendants induced Plaintiffs to engaged in loan modification review leading them to believe they will obtain a monthly payment that is lower than the amount due at the time. However, Defendant Bayview failed to adequately review Plaintiffs' application and started foreclosing on the Subject Property prior to reaching a proper decision. Defendants also engaged in "Dual-Tracking", a grossly unfair practice that they had specifically been reprimanded for and committed to halt during the recent national mortgage settlements.

Here, Defendants acted "unfairly" and "unlawfully" because initiating foreclosure activity, in direct violation to the Home Owners' Bill of Rights, and their express promises to Plaintiffs further reaffirm Plaintiffs' claims of unfair conduct under the UCL.

IV. BALANCE OF HARMS

The harm Plaintiffs will suffer if the Subject Property is sold in foreclosure outweighs any harm to the Defendants. If Plaintiffs succeed on their case, they will

1 remain the owner of the property at issue. If not, Defendants would be free to continue
2 with their foreclosure proceedings and recoup any claimed losses.

3
4 A Plaintiff seeking injunctive relief is required to demonstrate that she will
5 suffer immediate and irreparable injury due to the inadequacy of other legal remedies.
6 *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981), 118 Cal.App.3d
7 863. Irreparable harm is often related to an "inadequate legal remedy," where relief
8 cannot be granted unless a party is injured in a way which cannot later be repaired. *Id*
9 at 870-71. In "evaluating interim harm, the trial court compares the injury to Plaintiff
10 in the absence of an injunction to the injury Defendant is likely to suffer if an
11 injunction is issued." *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618,
12 633. The harm Plaintiff will suffer if the Subject Property is wrongfully foreclosed on
13 is sever and the resulting eviction from their home is irreversible.

14
15 In addition, the threat of "irreparable harm" must be imminent, as opposed to a
16 mere possibility of harm sometime in the future, in that the threat "must be supported by
17 actual evidence that there is a realistic prospect that the party enjoined intends to engage
18 in the prohibited activity." *Korean Philadelphia Presbyterian Church v. California*
19 *Presbytery* (2000) 77 Cal.App.4th 1069. Here the harm is imminent because the
20 foreclosure sale of the Subject Property is scheduled to take place on June 14, 2013.

21
22 Furthermore, the Court in *Nichols v. Deutsche Bank Nat. Trust Co.* 2007 WL
23 4181111, at *3, held that **"the imminent foreclosure of Plaintiff's residence presents**
24 **a threat of irreparable harm."** Similarly, in *Wrobel v. S.L. Pope & Associates*, 2007

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1 WL 2345036, at *1, the Court found that **“losing one’s home through foreclosure is**
2 **an irreparable injury.”** Moreover, pursuant to *Civil Code* §3387, all real property is
3 deemed "unique," so any injury/loss cannot be compensated in damages, and injunctive
4 relief is therefore readily granted.
5

6 **V. THE PUBLIC INTEREST**

7
8 Plaintiffs submit that public interest favors the granting of the requested relief.
9 The public has an interest in the orderly administration of justice with respect to this
10 transaction which will be defeated if the relief sought is not granted. Public policy
11 favors the proper adjudication of claims of predatory lending against homeowners.
12 Additionally, public policy dictates that the Plaintiffs should not be rendered homeless
13 without a full adjudication of their case on the merits.
14

15
16 The foreclosure activity in California has adversely affected property values and
17 resulted in less money for schools, public safety, and other public services. According
18 to the Urban Institute, every foreclosure imposes significant costs on local governments,
19 including an estimated nineteen thousand two hundred twenty-nine dollars (\$19,229) in
20 local government costs. As a direct, proximate, and foreseeable result of the unlawful
21 business acts or practices of Defendants, Plaintiff and the general public have been
22 injured, and Plaintiff is entitled to relief, including full restitution and/or disgorgement
23 of all revenues, earnings, profit, compensation, and benefit, which may have been
24 obtained by Defendants as a result of such business acts or practices.
25
26
27

28 Currently there is an extremely high rate of foreclosures in Southern California

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1 real estate market. As a result, foreclosures contribute to neighborhood blight and bring
2 other property owners values down. The foreclosure also foster crime as gangs and
3 drug dealers move into the abandoned homes. A foreclosure sale of Plaintiffs' home
4 will add to these problems, which are not in the public's interest.
5

6 The California Legislature has found and declared "This act is an urgency statute
7 necessary for the immediate preservation of the public peace, health, or safety within
8 the meaning of Article IV of the Constitution". In addition, "These changes in
9 accessing the state's foreclosure process are essential to ensure that the process does not
10 exacerbate the current crisis by adding more foreclosures to the glut of foreclosed
11 properties already on the market when a foreclosure could have been avoided. This
12 foreclosure can and should be avoided.
13
14
15

16 **VI. NO BOND SHOULD BE REQUIRED**

17 In this case, to require a bond in any substantial amount is effectively to deny
18 Plaintiffs the requested relief. Defendants are already protected by their lien security
19 interests in Plaintiffs' home, so additional security in the form of a bond should be
20 unnecessary. Should this court find it proper to order an undertaking, Plaintiffs propose
21 that the amount be equal to the monthly mortgage payments due under the note, payable
22 on a monthly basis.
23
24

25 **VII. CONCLUSION**

26 As stated herein, Plaintiffs hereby plead to this court to stop the unlawful sale of
27 their home. Plaintiffs have shown that the issuance of a Temporary Restraining Order
28

1 is justified because of high likelihood of success on the merits, the irreparable harm,
2 and the insignificance of any harm or benefit to Defendants. The issuance of TRO will
3 also serve the public's interest in maintaining safe neighborhoods, avoiding further
4 decline in property values and generation of property taxes for the city and county.
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6
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10 Dated: June 12, 2013

LAW OFFICES OF JOSEPH R. MANNING, JR.
A PROFESSIONAL CORPORATION

11
12 By: /S/ Joseph R. Manning, Jr.
13 Joseph R. Manning, Jr., Esq.
14 Babak Hashemi, Esq.
15 Attorneys for Plaintiffs
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DECLARATION OF BABAK HASHEMI

I, Babak Hashemi declare as follows:

1. I am a resident of the County of Orange. I am over the age of 18.
2. I am of counsel to the Law Offices of Joseph R. Manning, Jr., APC and associate counsel of record in the above-referenced action.
3. I have personal knowledge to the facts herein, and if called as a witness, I would competently testify to their veracity in court.
4. On June 11, 2013, my office conferred with counsel for Defendants in order to maintain status quo by requesting postponement of the scheduled foreclosure and initiating foreclosure alternative review procedures based on *California Civil Code* §2923.6.
5. The scheduled trustee date of the Subject Property remains active for June 14, 2013 and no foreclosure alternatives have been discussed between the parties.
6. This office provided written notice of this ex parte hearing to Defendants' Counsel on June 12, 2013. A true and correct copy of said notice is attached hereto as **Exhibit "H"**.

Executed on June 12, 2013, at Newport Beach, California. I declare under the penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

/S/ Babak Hashemi
Babak Hashemi, Esq.

PROOF OF SERVICE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the cause. My business address is 4667 MacArthur Blvd., Suite 150, Newport Beach, CA 92660.

On June 13, 2013 I served the true copies of the foregoing document described as **PLAINTIFFS' EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND [PROPOSED] ORDER** on the interested parties in this action, addressed as follows:

Served Electronically via Court's CM/ECF System:

Attorneys for Defendant

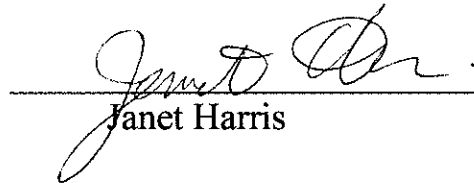
Nicole S. Dunn

Wright Finlay & Zak, LLP.

4665 MacArthur Court, Suite 200

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

This declaration is executed in Newport Beach, California, on **June 13 2013**.


Janet Harris

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